

STATE OF INDIANA

CRAWFORD CIRCUIT COURT

COUNTY OF CRAWFORD

**COMMISSIONER, INDIANA DEPARTMENT
OF ENVIRONMENTAL MANAGEMENT**

Petitioner

VS

CAUSE NO. 13C01-0806-MI-020

**DAVID A. CARTER
CAREFREE DEVELOPMENT CORP.
et al**

Defendant

David A. Carter by and through counsel Marcus M. Burgher III filed a timely appeal for judicial review of a Final Order issued by an Administrative Law Judge of the Indiana Department of Environmental Management. Said order was issued June 10, 2008.

Timely hearings were held with argument heard from Mr. Burger on behalf of David A. Carter et al and from Timothy J. Junk for the State of Indiana.

The administrative record has been reviewed the written presentations of the parties have been read and the evidence considered. After presentation of evidence, argument and the record of the administrative proceedings having been filed with the Court, comes now the Court and for Findings of Fact, Conclusions of Law and the Final Orders says as follows:

Findings of Fact

- 1. The complete record of the administrative proceedings has been submitted for the Courts review. All parties to this matter have a copy of those proceedings.**

The administrative record is accepted by the Court and made a part of this Courts record as if recited herein, verbatim;

- 2. David A. Carter is a developer and entrepreneur of some repute and reputation in Crawford County and adjacent area;**
- 3. David A. Carter has been the president and sole shareholder of a number of business entities;**
- 4. One of his business entities Opportunity Options, Inc. was administratively dissolved in December 2003;**
- 5. There is real estate near the Town of Leavenworth, Indiana, located adjacent to the Ohio River in which Opportunity Inc. may have had an ownership interest. Opportunity Options, Inc. was owned solely by David A. Carter;**
- 6. David A. Carter, as sole stockholder of Opportunity Options, Inc. proposed to build a subdivision with 72 buildings lots on land between the Ohio Vista Subdivision and the Ohio River. There was a plat of the proposed subdivision created by Timberlake Engineering for “client, David A. Carter” (David A. Carter Opportunity Options also appears prominently on the Timberlake plot.)**
- 7. David A. Carter is Carefree Development;**
- 8. David A. Carter operates his various business enterprises under Carefree Development Corp. and as an individual;**
- 9. September 2007 David A. Carter’s proposed plat for River Bluffs Estate was**

rejected by the Town of Leavenworth;

- 10. The Town of Leavenworth, in part of their written denial said:
“(3) Because of the extreme slopes and possibility of
foundations and structure damages to other homes
we find a Geological Technical Engineer should be
consulted for recommendation and approval”**
- 11. Carter was not deterred. Either Carter began construction prior to
submitting his plat for approval or he continued with this construction plans
after the denial;**
- 12. Carter’s construction project impacted an area equal to or greater than a one
(1) acre aggregate;**
- 13. Neither David A. Carter nor any of business entities ever submitted a
completed and approved Rule 5 plan as required by statute and
administrative regulations, specifically 327 IAC 15-5 et seq. From the start
of construction in September 2007, until this date, Carter has not submitted a
notice of intent nor a water pollution plan as required by administrative
regulations or statute;**
- 14. Carter has failed to take any corrective action to prevent or stop the erosion,
stabilize the topography or to protect adjacent land owners from the effects
of unpermitted construction activity;**
- 15. The land disturbed by Carter’s construction activities lies on steep hill side, a
bluff if you will. It is of precarious stability and by nature highly erodible.
Extremely susceptible to sloughing and subsidence once disturbed. Erosion**

has occurred since the start of the unpermitted construction which causes concern to the adjoining property owners, as well as the State of Indiana;

16. The actions of David A. Carter personally and as the sole shareholder and chief executive officer of Carefree Development Corporation, in fact and deed, places the home owners and property interests of all those located on land situated above Carters proposed development at risk and serious peril;

17. The Indiana Department of Environmental Management afforded Carter ample opportunity to bring his property into compliance.

Carter was notified of non-complying operations and occurrences on his property. He was given specific notice as to the alleged violation.

- October 3, 2007 Violation IDEM letter to Carter violations at River Bluff Estate
- November 7, 2007 IDEM sent notice of violation to Carter
- January 31, 2008 IDEM issued a Commissioners Order against Carter to prevent any further erosion – assessed a civil penalty of \$49,685 for repeated violations
- Carter requested administrative review
- May 19, 2008 Administrative hearing before ALJ, Judge Catherine Gibbs
- June 10, 2008 IDEM ALJ Gibbs issued Findings of Fact and Final Order
- Carter sought Judicial Review

18. February 7, 2008 David A. Carter recorded a Corporate Warranty Deed conveying numerous parcels of real estate in Crawford County from Opportunity Options, Inc. to Carefree Development Corporation.

The conveyed property was and is the same property upon which

David A. Carter was causing unpermitted construction activity to occur.

David A. Carter is the registered agent for Carefree Development Corporation;

- 19. At the time of the conveyance David A. Carter and Carefree Development Corporation were on notice that the ongoing construction was unpermitted and in violation of a previously entered Commissioners Order;**
- 20. This matter in its entirety was heard before the Indiana Office of Environmental Adjudication on May 19, 2008. The administrative law judge after being duly advised, having read the motions, briefs and record and after hearing heard the testimony entered Findings of Fact, Conclusions of Law and a Final Order, entered June 10, 2008;**
- 21. The final order was timely appealed to the Crawford Circuit Court, the Court with competent jurisdiction within Thirty (30) days after notice of the Administrative action was served;**
- 22. David A. Carter and Carefree Development Corporation had a hearing before the Indiana Office of Environmental Mangement. The findings of fact, conclusions of law and final order are subject to review, however such judicial review is limited to whether the agency based its decision on substantial evidence, whether the agency's decision was arbitrary and capricious and whether it was contrary to any constitutional, statutory or legal principle.**

Courts, when reviewing an administrative decision, are not allowed to conduct a trial "de novo", rather, the Court defers to an agency's fact findings, so long as its findings are supported by substantial evidence.

The party challenging an administrative action has the burden of

proving that the action was arbitrary and capricious, a decision that is patently unreasonable, made without consideration of the facts, in total disregard of the circumstances and lacking any basis that might lead a reasonable person to the same conclusion.

(See *Fornelli v City of Knox* (Ind 2009) 902 NE 2nd 889)

This Court can make no such finding in this judicial review.

Conclusion of Law

1. Interpretation of statutes and regulations by the administrative agency charged with enforcing those statutes and regulations is entitled to great weight, and reviewing courts should accept the agency's reasonable interpretation of such statutes and regulations, unless the agency's interpretation would be inconsistent with the law itself.

Indiana Dept. Of Environmental Management v. Steel Dynamics, Inc.
(Ind 2008) 894 NE 2nd 271, transfer denied.

2. Hearsay may not be the sole basis of a decision at any administrative hearing before an administrative law judge if properly objected to at the hearing and preserved on review; if the claimant did not object to the hearsay, however, then the ALJ may properly consider the evidence in reaching its decision.

Highland Town School Corp. v. Review Board of Indiana Dept. Of Workforce Dev. (Ind 2008) 892 NE 2nd 652.

3. Decisions of administrative agencies must be based on ascertainable standards to protect against arbitrary and capricious decisions. Ascertainable standards are necessary to give fair warning as to what factors agencies consider in making decisions.

Ind. Dept. Of Environmental Management v. Construction Management Associates, LLC. (Ind 2008) 890 NE 2nd 107

4. The burden of demonstrating that an administrative agency's action is invalid rests with the party asserting the invalidity.

Indiana Dept. Of Environmental Management v. Steel Dynamics, Inc. (Ind 2008) 894 NE 2nd 271, transfer denied

5. The Party challenging an administrative action has the burden of proving that they are entitled to relief from the action.

(Bd of Commissioners of LaPorte Cty v. Great Lakes Transfer LLC (Ind 2008) 888 NE 2nd 784

6. Review of an agency's decision is largely confined to the agency record and a court may not substitute its judgment for that of the agency.

IBID (Ind 2008) 888 NE2nd 784

7. A Courts review of an administrative decision is limited to whether the agency based its decision on substantial evidence, whether the agency's decision was arbitrary and capricious, whether it was contrary to any constitutional, statutory or legal principle.

Fornelli v. City of Knox (Ind 2009) 902 NE 2nd 889

ORDER

Comes now the Court after a thorough review of the evidence and the certified record of proceedings before the Indiana Department of Environmental Management, orders as follows:

It is hereby ORDERED ADJUDGED and DECREED that David A. Carter personally and in his capacity as sole shareholder, and director of Carefree Development Corporation and Carefree Development Corporation an Indiana business SHALL:

- 1. Immediately cease and desist all construction activities on property commonly known as River Bluffs Estate and any other realty that lies along the Ohio River in Crawford County, Indiana. Immediately cease and desist from any violations of 327 IAC 15-2-5, 327 IAC 15-5-2; 327 IAC 15-5-5, 327 IAC 15-5-6, 327 IAC 15-5-6.5, 327 IAC 15-5-7;**
- 2. Immediately and without further delay, address erosion and sediment issues associated with grading or bulldozing at the subject site.**
- 3. Immediately and without further delay present to IDEM a Comprehensive Corrective Action Plan. The Plan must address soil erosion, sedimentation and stabilization of the areas approved by IDEM and corrective action must begin within 30 days of this Order.**

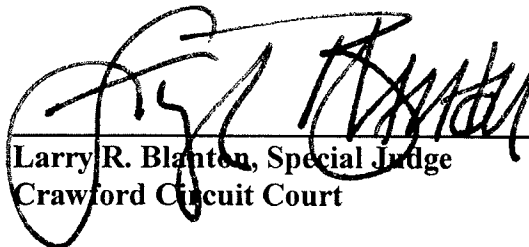
Appropriate action must be taken to address the sloughing, slippage and land slides in the area.

The Indiana Department of Environmental Management shall be the final arbiter of the term “appropriate corrective action”.
- 4. Immediately, forthwith and without further delay, comply with all prior orders issued by the Indiana Department of Environmental Management as set out in the Order of the Hon. Catherine Gibbs, Environment Law Judge dated June 10, 2008.**

The Findings of Facts, Conclusions of Law and Final Order issued by Hon. Catherine Gibbs are adopted by this Court and shall be the final Orders of this Court as if recited verbatim herein.

This is a final and appealable Order there being no just cause for delay.

This 14 day of May, 2009.


Larry R. Blanton, Special Judge
Crawford Circuit Court

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